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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

NORMAN MAIDEN, JR.,

Defendant and Appellant.

B208465

(Los Angeles County Super. Ct.  
No. BA319262)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carol H. Rehm, Jr., Judge. Reversed.

Gloria C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson and Elaine F. Tumonis, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant was charged with murdering Brian “Duke” Buchanon (Pen. Code, § 187)<sup>1</sup> and with being a felon in possession of a firearm (§ 12021, subd. (a)(1)). The jury found him not guilty of the murder and the lesser offenses of voluntary and involuntary manslaughter, but guilty of the possession offense. The trial court imposed the low term of 16 months in state prison and ordered restitution in the amount of \$8,616. As defendant’s pre-confinement credits exceeded that term, defendant was released on parole at the time of sentencing.

In his timely appeal, defendant contends the trial court prejudicially failed to instruct the jury on transitory possession as a defense to the possession offense, and the trial court abused its discretion in connection with its restitution order. We accept the Attorney General’s stipulation of reversible error as to the first contention; however, the question remains whether defendant may be retried on that count.<sup>2</sup> We reverse the judgment but conclude double jeopardy concerns do not prevent the prosecution from retrying defendant should it elect to do so.

## **STATEMENT OF FACTS**

Brandy Burgos was defendant’s girlfriend.<sup>3</sup> On February 6, 2007, she was employed in Carson. She finished work at approximately 12:30 a.m. and tried unsuccessfully to call defendant for a ride home because he had borrowed her car. Burgos also tried calling defendant’s sister, La Funda, who lived with defendant’s mother on 11th Avenue in Los Angeles. However, Buchanon, who was visiting at the duplex,

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<sup>1</sup> All further statutory references are to the Penal Code.

<sup>2</sup> Of course, given that defendant’s conviction is reversed, his second contention is moot.

<sup>3</sup> She was originally charged with murder, along with defendant. Prior to defendant’s trial and pursuant to an agreement with the prosecution, she was charged with, and entered a guilty plea to, being an accessory after the fact. Her sole obligation under the agreement was to testify truthfully.

answered Burgos's call. Buchanan swore at her and hung up the telephone. Burgos called back and they argued with each other, exchanging profanities. Afterwards, she managed to reach defendant, who picked her up at work. Burgos told defendant about her argument with Buchanan.

When defendant arrived in Carson, he got into the passenger seat and Burgos drove. Defendant wore a jacket with pockets. Defendant called his mother to check on her. He was not able to speak to her, but—over the speaker phone—he and Burgos heard Buchanan threatening to beat up defendant's mother and sister. They decided to drive to the 11th Avenue residence. When they arrived some 15 to 20 minutes later, she parked and they walked toward the residence's front gate. Buchanan was leaning against the wall. As Burgos walked past him, Buchanan swore at her and threatened to beat her. She tried to ignore him, but eventually became angry and swore back at him. At that time, she, Buchanan, and defendant were all in the driveway.

Burgos turned and faced Buchanan, who threatened to call "some girls to jump [her]." Defendant intervened and told Buchanan to "back away," but Buchanan continued to approach Burgos. Standing between Buchanan and Burgos, defendant repeatedly pushed Buchanan away, as Buchanan tried to strike Burgos. After the fifth or sixth push, Burgos found herself backed against the wall. She noticed that defendant's right hand was in his pocket. She saw defendant's elbow move back, consistent with withdrawing something from his pocket. All of a sudden, Burgos saw defendant holding a gun in his right hand and firing at Buchanan. One of the gunshots struck Buchanan fatally in the chest. Burgos did not see Buchanan with a gun earlier that night. No firearm was found at the scene.

## **Defense**

Officer David Ross, a gang expert, testified that Buchanan was a member of the Rollin 60's gang, the gang that claimed the shooting scene as its territory for the purposes of selling narcotics and committing violent crimes. La Funda testified that Buchanan had

threatened her and her mother on the night of the shooting. La Funda had seen Buchanan in possession of handguns several times in the past.

Defendant testified on his own behalf. He admitted suffering a felony conviction in 1990. He was off from work on the day of the shooting and was asleep when Burgos called for a ride home. Eventually, he got her message and picked her up. Burgos told him that Buchanan was threatening to hurt defendant's mother. When they arrived at the 11th Street residence, Buchanan confronted and tried to attack Burgos. Defendant stood between them and blocked Buchanan as he tried to punch Burgos. Defendant pushed Buchanan away and saw him holding a gun. Defendant grabbed the firearm from Buchanan. As the latter tried to wrest it away, defendant fired it in Buchanan's direction. At that time, defendant feared Buchanan would shoot him and Burgos. Defendant did not have a gun of his own. Immediately after the shooting, he threw the gun away in a nearby yard. Defendant denied having his hand in his pocket before the shooting.

## DISCUSSION

The parties did not request an instruction on the defense of transitory possession in regard to the charge of felon in possession of a firearm. However, “[i]t is settled that, even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury’s understanding of the case.” (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) The transitory possession defense derives from the holding in *People v. King* (1978) 22 Cal.3d 12. As set forth in CALJIC No. 12.50, the defense applies where the defendant, (1) having reasonable and actual grounds to believe that he or she—or others—were in imminent peril of great bodily harm; (2) and having a firearm “made available” to him or her “[w]ithout preconceived design”; (3) took temporary possession of the firearm “for a period of time no longer than that in which the necessity or apparent necessity to use it in self-defense”; and (4) the firearm use “was reasonable under the circumstances” and the only resort, where “no alternative means of

avoiding the danger were available.” (CALIC No. 12.50; see *People v. King*, *supra*, 22 Cal.3d at p. 24.)

As our statement of the facts makes clear, defendant’s trial testimony provided a sound evidentiary basis for imposing a sua sponte obligation to instruct the jury with the transitory possession defense to the charge of felon in possession of a firearm. From our review of the record, the failure to do so was understandable because the parties and the trial court were focused on the murder allegation and lesser offense instructions. Further, we accept the Attorney General’s concession that the failure to so instruct was prejudicial under the circumstances of this case.

Nevertheless, the question arises whether the proscription against subjecting a criminal defendant to double jeopardy precludes the People from retrying defendant for being a felon in possession of a firearm.<sup>4</sup> On the one hand, “[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.” (*People v. Costa* (1991) 1 Cal.App.4th 1201, 1208, quoting *Burks v. United States* (1978) 437 U.S. 1, 11.) However, “the Double Jeopardy Clause imposes no limitation upon the power of the government to retry a defendant who has succeeded in persuading a court to set his conviction aside, unless the conviction has been reversed because of the insufficiency of the evidence.” (*Oregon v. Kennedy* (1982) 456 U.S. 667, 676, fn. 6; *In re Martin* (1987) 44 Cal.3d 1, 53.) That is, “reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair

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<sup>4</sup> In that event, no greater punishment could be imposed than the 16-month prison term, which defendant has already served.

readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.” (*Burks v. United States, supra*, 437 U.S. at pp.15-16.)

Here, the prosecution presented constitutionally sufficient evidence to support a conviction under section 12021. As both parties acknowledged at trial in their closing arguments, the evidence permitted the jury to draw alternative reasonable inferences—either defendant brought the weapon to the scene of the crime, based on Burgos’s testimony that he reached into his pocket with his right hand and appeared to draw something out just before shooting Buchanon, or Buchanon brought the weapon to the scene and defendant possessed it only for the time it took to defend himself and Burgos, based on defendant’s own testimony. Accordingly, contrary to defendant’s assertions, this was not a case like *People v. Glenos* (1992) 7 Cal.App.4th 1201, in which “there was a complete absence of evidence” as to the element on which the trial court failed to instruct, such that the jury could not have convicted the defendant if it had been correctly instructed. (*Id.* at p. 1212.)

Therefore, the Double Jeopardy Clause does not proscribe the prosecution from retrying defendant’s section 12021 conviction.

## **DISPOSITION**

The judgment is reversed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.